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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JIM MALONE,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

E067966

(Super.Ct.No. CIVDS1517765)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Rodriguez Law Group and Patricia Rodriguez for Plaintiff and Appellant.

Anglin Flewelling Rasmussen Campbell & Trytten, Robert Collings Little and Benjamin G. Diehl for Defendant and Respondent.

In a first amended complaint (FAC), plaintiff and appellant Jim Malone (Malone) sued defendant and respondent Wells Fargo Bank, N.A. (Wells Fargo), and RTS Pacific, Inc. (RTS) for (1) wrongful foreclosure; (2) recording a notice of default

without being the beneficiary under the deed of trust (Civ. Code, § 2924, subd. (a)(6))¹; (3) filing a notice of trustee's sale that was not supported by competent and reliable evidence (§ 2924.17); (4) breaching the covenant of good faith and fair dealing; (5) failing to provide reasons for denying Malone's request for a loan modification (former § 2923.6, subd. (f)); and (6) engaging in unlawful, unfair, or fraudulent business practices (Bus. & Prof. Code, § 17200). The trial court sustained Wells Fargo's demurrer to the FAC without leave to amend and dismissed the case with prejudice. Malone contends the trial court erred by sustaining the demurrer. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FAC

On February 7, 2007, Malone borrowed \$372,000 from World Savings Bank, FSB (World Savings). The promissory note was secured by a deed of trust on Malone's house, located in Yucaipa (the property). In 2008, Wells Fargo purchased World Savings, which at that point had changed its name to Wachovia Mortgage, FSB, thereby acquiring its assets and liabilities. RTS was Wells Fargo's trustee for the deed of trust. On December 15, 2014, San Bernardino County recorded a notice of trustee's sale against the property.

¹ All subsequent statutory references will be to the Civil Code unless otherwise indicated.

Malone alleged the promissory note and deed of trust were “never properly assigned to Wells Fargo in accordance with the Pooling and Servicing Agreement” (PSA). Malone contended that, in order to foreclose, Wells Fargo and RTS needed to have (1) “a complete and unbroken chain of endorsements of the Note”; (2) “physical possession of the Note”; (3) “a complete and unbroken chain of transfers of the [d]eed of [t]rust”; and (4) “physical possession of the [d]eed of [t]rust.” Malone alleged that Wells Fargo and RTS “cannot demonstrate that they had perfected their security interest in the property.”

Further, Malone alleged Wells Fargo arbitrarily denied his request for a loan modification. Malone alleged the reason given by Wells Fargo for the denial was that Wells Fargo “ ‘determined there [had not] been a large enough change since the last review to consider a new review.’ ” Malone alleged that Wells Fargo’s conclusion was arbitrary because (1) it was not supported by mathematical or financial data, and (2) Malone was not informed of the factors considered by Wells Fargo.

Malone’s first cause of action was for wrongful foreclosure. Malone alleged the promissory note was “sold, transferred and securitized into the Securitized Trust.” Malone asserted “no documents or records can be produced that demonstrate that prior to the closing date, the Deed of Trust was duly assigned, transferred and delivered to the Trust including all intervening assignments, as required by the Securitized Trust governing documents.” Malone alleged that “the Assignment purporting to transfer beneficial interests to [Wells Fargo] as trustee . . . occurred well after the Closing Date of the Securitized Trust.” Malone alleged the transfer of beneficial interest to Wells

Fargo was void because it did not conform to the requirements of the Securitized Trust. Malone explained, “The gravamen of [Malone’s] complaint is that Defendants are attempting to foreclose without any legal authority or standing to do so.”

Malone’s second cause of action was for recording a notice of default without being the beneficiary under the deed of trust. (§ 2924, subd. (a)(6).) Malone alleged that Wells Fargo and RTS “were never the holder of the Deed of Trust as the Deed of Trust and Note were taken out with [World Savings]. [¶] Since [Wells Fargo] nor foreclosing trustee RTS, are the holder of the beneficial interest not the original trustee under the mortgage or deed of trust they do not have the standing to record a Notice of Trustee’s Sale against [Malone].”

Malone’s third cause of action was for filing a notice of trustee’s sale that was not supported by competent and reliable evidence. (§ 2924.17.) Malone’s fourth cause of action was for breaching the covenant of good faith and fair dealing. Malone alleged, “Defendants are attempting to commence foreclosure against [Malone] by serving and recording a Notice of Default on [the property] . . . without any legal authority to do so.”

Malone’s fifth cause of action was for Wells Fargo’s failure to provide reasons in support of its denial of Malone’s requested loan modification. (Former § 2923.6, subd. (f).) Malone faulted Wells Fargo for denying Malone’s request for a loan modification and not supporting the denial with “any specific mathematical and financial analysis.”

Malone's sixth cause of action was for fraudulent business practices. (Bus. & Prof. Code, § 17200.) Malone alleged that Wells Fargo and RTS "engaged in deceptive business practices by attempting to collect on a debt that was void and unenforceable, by failing to authorize a loan modification request by [Malone] and thereby denying hi[m] the benefits of the loan agreement and of the benefits of the Federal Loan Modification program (HAMP)." Further, Malone alleged that Wells Fargo and RTS "engaged in deceptive business practices by fraudulently recommending, offering, marketing, accepting, purchasing, and[/]or collecting on a debt/mortgage that they each knew or should have known was void due to the illegal nature of the contract that would inevitably cause default before completion of the loan term and was therefore unconscionable as a violation of the public policy of promoting home ownership and preventing foreclosures (Cal. Civil Code § 2923.5)." Malone sought damages according to proof.

B. DEMURRER

Wells Fargo demurred to Malone's FAC. Wells Fargo asserted Malone's first through fourth causes of action were based upon the theory that Wells Fargo and RTS did "not possess the original note and are not holders in due course or beneficiaries under the Deed of Trust and therefore lack authority to collect the loan payments or foreclose on the Property." Wells Fargo asserted that the law does not require possession of the original promissory note in order to foreclose. Wells Fargo explained that judicially noticeable documents reflected Wells Fargo was the beneficiary of the deed of trust, as the successor of World Savings, and had the right to foreclose. Further,

Wells Fargo asserted nothing in the loan documents reflected that the loan was securitized. Wells Fargo explained that it became the beneficiary of the deed of trust due to its acquisition of World Savings/Wachovia. Wells Fargo asserted it had the right to collect Malone's loan payments and to foreclose on the property because it was the beneficiary of the deed of trust.

In regard to the fifth cause of action for failing to provide reasons for the denial of Malone's requested loan modification (former § 2923.6, subd. (f)), Wells Fargo asserted that section 2923.6, subdivision (f), did not apply to Malone's request. As to the sixth cause of action for fraudulent business practices, Wells Fargo asserted, "[T]o the extent [Malone's] UCL claim is predicated on the preceding causes of action and/or Wells Fargo's lack of ownership of the loan, such claim still fails. Since, as discussed above, those claims are defective, they cannot support a UCL claim."

C. OPPOSITION

Malone opposed Wells Fargo's demurrer. Malone argued as follows: "[Malone] alleges that the assignment is void, because it was attempted to be transferred directly to the trust without intervening assignments and because it was transferred after the closing of the securitized trust." Malone continued, "[I]t is [Malone's] allegation that the Assignment purporting to transfer beneficial/ownership interest to Wells Fargo as Trustee is void as not conforming to the Securitized Trust's governing documents and on the basis that the purported Assignment took place well after the Closing Date of the Securitized Trust which was in 2007." Malone further argued that Wells Fargo and

RTS were not “the true interest holders of the . . . Deed of Trust,” and, therefore, they could not foreclose on the property.

In regard to the loan modification, Malone asserted “it is clear that Wells Fargo denied [Malone’s] application for a loan modification without providing any specific reasons.” As to the fraudulent business practices cause of action, Malone asserted he “alleged that Defendant engaged in deceptive business practices by attempting to collect on a debt and attempting to commence foreclosure proceedings without any legal standing or authority to do so. . . . Furthermore, Defendants failed to authorize a loan modification request by [Malone] and denied him the benefit of [Malone’s] Loan Agreement and of the benefits of the Federal Loan Modification programs (HAMP) and other loan default resolution programs without good cause.”

D. HEARING

The trial court held a hearing on Wells Fargo’s demurrer. At the hearing, Wells Fargo asserted that it “assumed ownership of the loan through the merger There’s no notice of default or notice of sale in the name of [a] trustee of [a] securitized trust.”² Malone argued, “[T]he assignment which purported to transfer all beneficial and ownership interest to Wells Fargo as a trustee in this case is void as nonconforming to the securitized trust documents and the fact that the assignment occurred after the

² A portion of the reporter’s transcript appears to have misidentified the speakers. We infer a portion of the transcript is incorrect regarding the speakers’ identities because it reflects the argument in favor of the demurrer was made by Malone’s counsel, and that the argument opposing the demurrer was made by Wells Fargo’s counsel.

closing date of the trust which was in 2007.” The trial court took the matter under submission.

E. RULING

The trial court issued a written ruling. The trial court sustained the demurrer without leave to amend. The trial court concluded that Wells Fargo was not required to have the original promissory note in its possession prior to commencing foreclosure proceedings. In regard to Wells Fargo being the beneficiary of the deed of trust, the trial court found that Malone alleged Wells Fargo acquired World Savings. The trial court concluded that, due to the acquisition, there was no need for a formal assignment of the deed of trust to Wells Fargo. The trial court wrote, “Thus, the allegations of no complete and unbroken chain existing [*sic*] have no foundation since no assignment [was] required between World Savings and Wells Fargo.”

In regard to securitization of the loan, the trial court wrote, “Malone speaks of the securitization of his loan, but he provides no facts or allegations to support his [allegation that his] Note and/or Trust Deed [were] assigned to a securitized trust. In fact, Wells Fargo is named in its own capacity versus as the trustee of some securitized trust. Wells Fargo further has appeared in its own name versus as the trustee of a some [*sic*] securitized trust that holds the interest in Malone’s Note and Trust Deed.

“Additionally, Malone argues and alleges any conveyance to the securitized trust is void because any transfer occurred after the trust’s closing Again, this is [a] conclusory allegation[] without factual support, e.g., the [name of the] securitized trust

to which the Note and Trust Deed purportedly [were] transferred to, the date of the purported transfer, the date of the closing of the trust, etc.”

In regard to the cause of action that alleged a failure to provide reasons for the denial of Malone’s requested loan modification, the trial court wrote, “[U]nder Civ. Code 2923.6(f)(2) and (3), the duty to make those disclosure[s of reasons] arises if the denial of the first lien loan modification application was based on those [statutorily enumerated] reasons. Malone[] alleges the reason for the denial of a second loan modification review was because Wells Fargo found insufficient financial change to warrant a second review He was not denied because of an investor disallowance or because of a net present value calculation to warrant detail explanation [*sic*] under Civ. Code 2923.6(f)(2) and (3).”

In regard to the unfair business practices cause of action, the trial court found (1) Wells Fargo was the beneficiary of the deed of trust by virtue of purchasing World Savings, and therefore, could properly foreclose; and (2) it was unclear from the allegations how a deceptive business practice caused Malone to become delinquent on his loan payments

In regard to amending, the trial court found that Malone had a prior opportunity to amend after the demurrer to the original complaint was sustained with leave to amend. The trial court found Malone’s amendments did not result in sufficiently pled causes of action. Therefore, the trial court denied leave to amend.

DISCUSSION

A. STANDARD OF REVIEW

“ ‘We review de novo the trial court’s order sustaining a demurrer.’ [Citation.] In doing so, this court’s only task is to determine whether the complaint states a cause of action. [Citation.] We accept as true all well-pleaded allegations in the operative complaint, and we will reverse the trial court’s order of dismissal if the factual allegations state a cause of action on any available legal theory.” (*Brown v. Deutsche Bank National Trust Company* (2016) 247 Cal.App.4th 275, 279.)

B. STANDING

Malone contends he has standing to challenge an unlawful assignment of the deed of trust. Malone contends his “[w]rongful [f]oreclosure claim was erroneously dismissed and [he] was disallowed the ability to address the issues regarding the botched securitization and the allegation that neither their Note nor the Deed of Trust was assigned to the Securitized Trust by the requisite Closing Date of the trust. Therefore, under the PSA, any assignment of the Deed of Trust beyond the specified Closing Date for the trust would be void.”

Malone provides no record citations to support his contention. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 (*Duarte*) [issue forfeited due to lack of record citations].) Our review of the record reflects the trial court found Malone lacked “standing to challenge any purported assignment into an allege[d] securitized trust.” (See *Yvanova v. New Century Mortgage*

Corp. (2016) 62 Cal.4th 919, 929-935.) We will assume the foregoing conclusion constitutes the alleged error.

Despite its conclusion that Malone lacked standing, the trial court addressed the sufficiency of Malone's allegations. In particular, the trial court decided the sufficiency of the securitization allegations. The trial court wrote, "Malone speaks of the securitization of his loan, but he provides no facts or allegations to support his [allegation that his] Note and/or Trust Deed [were] assigned to a securitized trust. In fact, Wells Fargo is named in its own capacity versus as the trustee of some securitized trust. Wells Fargo further has appeared in its own name versus as the trustee of a some [*sic*] securitized trust that holds the interest in Malone's Note and Trust Deed." Because the trial court addressed the sufficiency of the securitization allegations, to the extent any error was made on the issue of standing, the error was harmless. (See *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108 [a judgment may not be reversed unless prejudice is shown].)

C. SECURITIZATION

Malone contends he "sufficiently alleged that his Note and Deed [were] purportedly transferred and assigned into the Mortgage Loan Securitized Trust through executed [*sic*] well past the 2007 Closing Date of the Securitized Trust, thereby making it an invalid and void transfer." Malone provides no record citations to support his assertion. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital, supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].)

“Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.” (Corp. Code, § 1107, subd. (a).)

In the FAC, Malone alleged, “[I]n 2008[,] Wells Fargo Bank, N.A. purportedly purchased/acquired [World Savings’s] assets and liabilities.” Malone sued Wells Fargo in its own capacity, not as a trustee. Thus, the allegations in the FAC and the capacity in which Malone brought Wells Fargo into the lawsuit do not reflect that Wells Fargo was the trustee of a securitized trust. Rather, Malone’s allegations reflect that Wells Fargo acquired the deed of trust on the property via Wells Fargo’s acquisition of World Savings. Therefore, the attempt to allege that Wells Fargo inappropriately acquired an interest in the deed of trust, through an improper securitization of the deed of trust, is insufficiently pled. We conclude the trial court did not err.

D. ASSIGNMENT

Malone contends he adequately pled a lack of proper assignment to Wells Fargo. Malone fails to support his argument with record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital*, *supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].)

As one court has explained, “It has been established since 1908 that this statutory requirement that an assignment of the beneficial interest in a debt secured by real property must be recorded in order for the assignee to exercise the power of sale applies

only to a mortgage and not to a deed of trust.” (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122.)

As another court has explained, “[W]here a deed of trust is involved, the trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest is recorded. As the trial court succinctly stated in its decision sustaining the demurrer without leave to amend, ‘the purpose of [section] 2932.5 is to maintain a clear record of title by requiring mortgagees, given the power to sell real property, to record assignments of that right to assignees. [Citation.] Without a proper record indicating who currently holds the note that gives the power to sell, a purchaser of the property is at risk of buying an encumbered title. [Citation.] In contrast, a deed of trust passes legal title to the trustee, ‘thus enabling him in executing the trust to transfer to the purchaser a marketable record title.’” ’ (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 336-337.)

Malone did not allege that he had a mortgage. Rather, Malone alleged that his loan was secured by a deed of trust. Accordingly, we are not persuaded that an assignment had to be recorded.

Malone also asserts the trial court erred because Wells Fargo did not demonstrate that it possessed the original note and deed of trust. The law does not require possession of the original documents in order to foreclose. (§ 2924; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440.) We conclude the trial court did not err.

E. LOAN MODIFICATION

Malone contends the trial court erred by sustaining the demurrer to his cause of action concerning Wells Fargo's alleged failure to provide detailed reasons for its denial of his requested loan modification. (Former § 2923.6, subd. (f).) Malone fails to support his argument with record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital*, *supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].)

Former section 2923.6, subdivision (f), provided, "Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying the reasons for denial, including the following."

Former section 2923.6, subdivision (g), provided, "In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer."

In Malone's FAC he alleges, "[Malone] initiated a loss mitigation review process with Wells Fargo on or around September[]3, 2015, through the submission of a Change in Financial Circumstances correspondence, detailing a material change in

[Malone's] financial circumstances.” Malone further alleged, “After submitting all requisite documents as requested by Wells Fargo, [Malone] received a correspondence dated September 11, 2015, denying [Malone's] loan modification, arbitrarily stating: ‘we’ve determined there hasn’t been a large enough change since the last review to consider a new review.’”

The allegations in Malone's FAC reflect he did not fall within the provision for “denial of a first lien loan modification application.” (Former § 2923.6, subd. (f).) Rather, Malone's previous application had been denied, and he was submitting a subsequent application. The subsequent application caused him to fall within former section 2923.6, subdivision (g). An application under former subdivision (g) could be denied without providing detailed reasons. Accordingly, we conclude the trial court did not err.

F. COVENANT OF GOOD FAITH AND FAIR DEALING

Malone contends the trial court erred by sustaining the demurrer to his cause of action for breach of the covenant of good faith and fair dealing. Malone fails to support his argument with record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital*, *supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].)

Malone asserts Wells Fargo breached the covenant by not providing detailed reasons for denying his requested loan modification, and by misrepresenting itself as the beneficiary of the deed of trust. As explained *ante*, Malone's allegations in the FAC indicate he was not entitled to a detailed explanation concerning the denial of his

requested loan modification. (Former § 2923.6, subd. (g).) Also, as explained *ante*, Malone’s allegations in the FAC reflect Wells Fargo became the beneficiary of the deed of trust when Wells Fargo acquired World Savings. Accordingly, we conclude the trial court did not err.

G. FRAUDULENT BUSINESS PRACTICE

Malone contends the trial court erred by sustaining the demurrer to his fraudulent business practices cause of action. (Bus. & Prof. Code, § 17200.) Malone fails to support his argument with record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital, supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].)

Malone asserts the unfair business practice consisted of Wells Fargo misrepresenting itself as the beneficiary of the deed of trust. As explained *ante*, in the FAC, Malone alleged that Wells Fargo purchased World Savings in 2008 and “acquired [World Savings’s] assets and liabilities.” Thus, the FAC reflects Wells Fargo legally became the beneficiary of the deed of trust by purchasing World Savings. (Corp. Code, § 1107, subd. (a).) Therefore, we conclude the trial court did not err.

H. JUDICIAL NOTICE

Malone contends the trial court erred by accepting the truth of judicially noticed foreclosure documents.

Malone fails to support his argument with record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital, supra*, 72 Cal.App.4th at p. 856 [issue forfeited due to lack of record citations].) We see nothing indicating that the

trial court relied upon the truth of judicially noticed foreclosure documents when ruling upon the demurrer to the FAC.³ Rather, our review of the record reflects the trial court based its ruling on the deficiencies in the FAC. Because Malone does not direct this court to where in the record the trial court allegedly relied upon the truth of judicially noticed documents, we treat the issue as forfeited.

I. AMENDMENT

“ ‘Where the complaint is defective, “[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]” ’ [Citations.] This abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.)

The problems in the FAC are factual. Malone fails to explain how he will amend the FAC to cure the defects. Accordingly, we conclude the trial court did not err by denying leave to amend.

³ Wells Fargo asserts documents related to its request for judicial notice were omitted from the record, and therefore the record on appeal is inadequate.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MILLER

J.

We concur:

McKINSTER

Acting P. J.

RAPHAEL

J.